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No. 88-434

In the
Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD J. SINNOTT,
PETITIONER,

v.

CHARLES A. RADIN, STATE-BOSTON RETIREMENT BOARD, THOMAS W. GATELY, LOUISE DAY HICKS, NEWELL COOK, BRIAN LEAHY, HAROLD J. CARROLL AND KEVIN H. WHITE,
RESPONDENTS.

Respondent's Opposition to Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

E. SUSAN GARSH*
JONATHAN M. ALBANO
BINGHAM, DANA & GOULD
150 Federal Street
Boston, Massachusetts 02110
(617) 951-8000
Attorneys for Respondent
Charles A. Radin

**Counsel of Record*

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented for Review

I. Whether state law provided independent and adequate grounds for the Massachusetts Supreme Judicial Court's ruling that a trial court did not abuse its discretion in denying a motion to compel a reporter to disclose his confidential news sources, thus precluding the exercise of certiorari review.

II. Whether the petitioner's claim that the trial court's order denying him discovery violated his rights under the Fourteenth Amendment was adequately presented in the state system to justify the exercise of certiorari review.

III. Whether a state court's ruling that the public interest in the free flow of information outweighs the petitioner's interest in obtaining discovery and that, therefore, a non-party newsperson need not disclose his confidential news sources conflicts with federal law in a case where the Commonwealth's highest court has found that: (1) petitioner's civil invasion of privacy claims are of "questionable viability;" (2) alternative sources of the information sought from the newsperson are available to the petitioner; and (3) petitioner has failed to demonstrate a need to know the precise identity of the sources.

IV. Whether the First Amendment bars a public official from prevailing on a claim based upon the disclosure of truthful information concerning the questionable circumstances surrounding the official's application for a public disability pension arising out of the performance of the official's public duties, thereby rendering unnecessary the disclosure of a non-party newsperson's sources.

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RESPONDENTS.

Respondent's Opposition to Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

Respondent Charles A. Radin respectfully prays that Richard J. Sinnott's petition for a writ of certiorari to review the decision of the Massachusetts Supreme Judicial Court dated June 13, 1988 be denied.

Constitutional Provisions and Rules Involved

This case involves Article 16 of the Declaration of Rights of the Massachusetts Constitution and Massachusetts Rules of Civil Procedure 26(c) and 45:

> The liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.

Article 16 of the Declaration of Rights of the Massachusetts Constitution.

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; . . . .

Massachusetts Rule of Civil Procedure 26(c).

> Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court in which the action is pending.

Massachusetts Rule of Civil Procedure 45(f).

Statement of the Case

This petition arises out of an action for invasion of privacy brought by petitioner Richard J. Sinnott ("Sinnott"), a former

Boston public official, against the Boston Retirement Board and various Boston city officials. Respondent Charles A. Radin ("Radin") is a newspaper reporter employed by Globe Newspaper Company, publisher of *The Boston Globe*. Neither Radin nor the *Globe* are parties to the underlying case.

Sinnott claims that his privacy was invaded by the disclosure to Radin of the contents of an "accident statement" filed with a disability pension application submitted by Sinnott to the Boston Retirement Board in 1982. On April 5, 1982, the *Globe* published an article written by Radin (the "Article") which concerned the questionable circumstances surrounding Sinnott's accident statement. The Article was one of a series of over 150 stories published by the *Globe* concerning alleged abuses and inefficiencies in Massachusetts' $400 million-a-year public employee pension system.[1] The information in the Article concerning the contents of Sinnott's accident statement was obtained by Radin from confidential sources who provided

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[1] Among other cases reported in the *Globe* series were:

1. a City official named Robert Toomey who, after purchasing nine private insurance policies, retired on a lifetime disability pension as a result of an accident witnessed only by his friends and who, despite his claims to the contrary, was not wearing a cervical collar during all of his waking hours as a result of the accident;
2. a former Deputy Mayor named Clarence "Jeep" Jones who, after receiving a lifetime disability pension award, continued to work for, and be paid by, the City;
3. a City official who applied for a disability pension on the basis of nightmares he had suffered concerning City Council meetings and his fear of City Hall elevators;
4. a Boston City Hospital employee who had cashed a disability check for $6,670.48 while entitled to payment of only $670.48;
5. a Boston policeman who received a full disability as a result of an injured thumb; and
6. disability pension benefits paid to individuals who apparently were no longer alive. Supreme Judicial Court Record Appendix ("SJC R.A.") 52 at ¶5, 65-85.

the information on the express condition that Radin not reveal their identities. SJC R.A. 49-50, 65-66.

A. *Facts Surrounding Sinnott's Pension Application*

Sinnott is a long-time Boston public official and public figure. From 1960-68, he served as press secretary to Boston Mayor James F. Collins, as well as editor of the *City Record*, the City Greeter, and publicity chief for the Boston Traffic and Parking Department. SJC R.A. 91-92. In 1960, he also became the City's Licensing Chief, a position which gave him authority to censor entertainment in Boston. SJC R.A. 91-92. Sinnott also attained considerable notoriety as a columnist for several neighborhood newspapers in the Boston area and, more recently, as a $50,000 winner in the Massachusetts Lottery's "Big Money Game." SJC R.A. 11, 142043; *Boston Sunday Globe, Week in Review*, at 61 (Dec. 23, 1984).

On February 17, 1982, Sinnott was fired as the City Licensing Chief. SJC R.A. 94, 207. Within a few days after receiving notice of his termination, Sinnott telephoned Louise Day Hicks, a member of the Boston Retirement Board. SJC R.A. 125. Sinnott has described, under oath, their conversation as follows:

> I said, "Will you point me in the right direction? I want to apply for a pension." She said, "Gee, I think you have to do it within maybe 30 days, and this is a short month. You had better get this." She is not a bad person, so okay. She said, "What's been the matter with you"? I said, "I just haven't felt right. I haven't felt right for a long time." She said, "Well, why don't you apply for a disability." I said, "When"? (sic) She said, "For a disability pension.

> We took care of Bobby Toomey and Cheap (sic) Jones." [*See* n.1 *supra*] She said, "They've only been here a few years. You've been here, it seems, all of your life, and why don't you apply for a disability pension"? I said, "How the hell do I do that"? . . . she said, "Gee, if we did it for them, we certainly can do it for you."

SJC R.A. 113-14, 147-48.

Sinnott has testified that "[i]t was never [his] intention to file for a disability pension until Louise Day Hicks suggested it." SJC R.A. 111-12, 120, 146. He did not even think of retiring until after he learned he had been fired as Licensing Chief, a job to which he had hoped to "hold on." SJC R.A. 127-29, 155-A through 155-D, 159-C. Indeed, he challenged his firing, claiming that it was "illegal." SJC R.A. 94, 126, 138-40. Nevertheless, Sinnott retained an attorney recommended to him by Ms. Hicks and, on February 26, 1982, nine days after he was fired from a job he believed himself entitled to retain, applied for a disability pension which required him to be totally and permanently incapacitated. SJC R.A. 90, 115-17, 209.

The accident statement filed by Sinnott in connection with his application for a disability pension described three incidents which allegedly occurred over two years before while performing his public duties as Licensing Chief. First, Sinnott said that after attending a Rick James rock concert at the Orpheum Theatre on April 19, 1979, he "was unable to control [his] shaking and trembling" after a police confrontation with gate crashers. Sinnott stated that he suffered a further emotional setback by the unexpected death of an attorney during a "frenzied" licensing hearing on the allowance of a neighborhood arcade. SJC R.A. 50, 65-66, 209-210.

"The final incident which had a tremendously devastating effect upon me," wrote Sinnott, was the Who rock concert performed at Boston Garden on December 16, 1979.

> Many citizens as well as concert-goers besieged my office, in addition to media inquiries from throughout the country. There was intense pressure placed on me by all factions. . . . I attended the concert, and although there were 15,000 youngsters in attendance and no injuries, the concert itself was a reliving of the Rick James nightmare . . . [Crowd] noise was at a fever pitch and the explosion of cherry bombs near my location instilled a sense of terror throughout my entire body.

Sinnott's accident statement stated that following these three incidents, he "was reduced to a shell of [him]self, barely able to function." SJC R.A. 50, 65-66, 209-210.

On April 23, 1982, after the publication of the Article, Sinnott withdrew his disability application. SJC R.A. 132-33. On May 14, 1982, he commenced this action based upon the allegedly unauthorized disclosure of the contents of his accident statement. SJC R.A. 307.

In discovery taken in this case, Sinnott has admitted that his accident statement "made it appear that [he was] a faker trying to get something for nothing." SJC R.A. 172-73, 158-J through 158-K, 159, 182-83. Moreover, he has acknowledged that the accident statement which he executed contained several inaccuracies. For example, it erroneously stated that following the Who concert he received "*increased* and *constant* psychiatric care and medical attention." (Emphasis added.) In fact, he did not first see a psychiatrist until some 18 months *after* the Who concert. Sinnott also now concedes that he never has

received "constant" psychiatric care and, moreover, his entire treatment consisted of 6-8 visits with a psychiatrist. SJC R.A. 156-158-K.

Sinnott's accident statement also incorrectly stated that:

> It was during the past two years that the stress of my position took its toll. *At this time* I was under the care of . . . Doctor Daniel Weiss, a psychiatrist, for the emotional distress that accompanied my position.

(Emphasis added.) Contrary to the accident statement, Sinnott had not been under Dr. Weiss' care for two years at the time the application was filed, but rather first saw Dr. Weiss some seven months before he was fired in February of 1982. SJC R.A. 179-80.

As to his claim that he was "continuously" under doctors' care from 1964-82 for stress that accompanied his position as Licensing Chief, discovery has revealed that Sinnott's allegedly "continuous" medical care consisted principally of annual check-ups and blood pressure medication. SJC R.A. 99-104, 174-79.

On April 5, 1982, the Article was published in the *Globe*. The Article contained excerpts of Sinnott's accident statement, focusing on its references to the two rock concerts and the frenzied licensing hearing. No medical or psychological illness, diagnosis, treatment or prognosis was contained in the Article, nor were there any references to comments made by treating physicians or other medical personnel. Rather, the Article simply quoted Sinnott's description of his performance of his official duties and its alleged effect on him. SJC R.A. 65-66.

B. *Possible Alternative Sources for the Information Sought from Radin*

On March 17, 1982, after filing his accidental disability application but prior to the publication of the Article, Sinnott received a telephone call from Albert Kramer, the business manager for the Hynes Auditorium. According to Sinnott, Mr. Kramer said that Theodore Anzalone had Sinnott's pension application and that "they were going to do a job on me . . . and they were not going to let me go easy." SJC R.A. 108-109, 118, 131. Mr. Kramer has not been deposed in this case. SJC R.A. 204.

Sinnott has testified that he learned from several sources how his application was disclosed to so-called "unauthorized persons." SJC R.A. 7.

> Who disclosed my confidential disability application? All right, we will start with Mr. Brian Lahey, who is the executive officer of the Boston Retirement Board and who's charged with maintaining the records there and the confidentiality of any applications. Mr. Lahey took that application to the inside counsel. Mr. Cullen, and the outside counsel, Mr. Anzalone. Mr. Anzalone then showed it to his wife-to-be and they were so smitten by it, they made copies which they distributed around City Hall.
>
> The Anzalones then showed it to Kevin White, who summonsed Harold Carroll and George Regan, the Mayor's press secretary. . . . They showed it to an old friend of mine . . . Charles Radin.

SJC R.A. 105-106. The source of the foregoing information, Sinnott testified, was Louise Day Hicks. SJC R.A. 107.

Sinnott testified that other "[p]eople who saw copies of [his] medical application around City Hall" also provided him with information concerning how the application was made public. SJC R.A. 107. According to Sinnott, his application was shown around City Hall by his boss, Joanne Prevost. SJC R.A. 145, 181. A Mr. Kenneth Whelan told Sinnott that an employee of the licensing division named Marlene Knight showed him a xerox copy of Mr. Sinnott's application. Ms. Knight reportedly told Mr. Whelan that Joanne Prevost was "overjoyed" that she had his application. SJC R.A. 152-55. Neither Mr. Whelan nor Ms. Knight have been deposed in this action. SJC R.A. 204.

According to Sinnott, attorney Vincent Murray told him that the defendant Louise Day Hicks stated that Theodore Anzalone and Joanne Prevost obtained Sinnott's application two days before the Article was published and provided it to Mayor White and Harold Carroll. SJC R.A. 118-A through 119. Mr. Murray has not been deposed in this action. SJC R.A. 204.

Mr. Sinnott also has testified that Barbara Powderly, a Retirement Board employee told Mr. Sinnott that Mr. Gately had said that "we set him up and *The Globe* finished him off." SJC R.A. 149-51. Ms. Powderly also has not been deposed. SJC R.A. 204.

Joanne Prevost Anzalone and Theodore Anzalone, neither of whom are parties to this case, have invoked the Fifth Amendment and refused to testify concerning their knowledge, if any, of the underlying facts of plaintiff's case. SJC R.A. 219, 229-A, Supp. SJC R.A. 342-69.

C. *Public Interest in The Globe Series*

The *Globe's* series on pension abuse assisted legislative efforts to reform the Massachusetts public employee pension system. In the words of a former state legislator and Deputy

Commissioner of the Division of Public Employee Retirement Administration:

> In 1982, as a result of a series of articles published in *The Boston Globe* concerning alleged abuses and inefficiencies in the public employee pension system, considerable attention was given to the system and to its problems. . . . The public attention given to the pension system as a result of the *Globe's* articles enabled those of us in the Legislature who previously had attempted to gather support for reforming the pension system to enlist the support needed to pass significant and comprehensive legislation reforming the pension system and, consequently, save the taxpayers millions of dollars.

SJC R.A. 52-53.

D. *The Supreme Judicial Court's Opinion*

In its opinion reversing the judgment of contempt entered against Radin, the Supreme Judicial Court ("SJC") stated that "the narrow question on review" was whether the trial judge had abused the "broad measure of discretion" accorded him in denying Sinnott's motions to compel Radin to reveal the sources of the Article. Petitioner's Appendix ("App.") 13. The court observed that its prior opinions framed the "critical inquiry" as a balancing between the public interest in every person's evidence and the public interest in protecting the free flow of information. App. 15-16. It then held that the trial court's assessment of the relative weight of those public interests could not be said, as a matter of law, to be incorrect, "especially in light of the questionable viability of Sinnott's

invasion of privacy claims and the lack of a clear demonstration of reasons for a need to know the precise identity of Radin's sources." App. 18-19. In addition, the SJC held that the trial court correctly had considered the availability of alternative sources in denying further discovery from Radin. App. 19. Finding no abuse of discretion, the judgment of contempt was reversed. App. 14.

Reasons Why a Writ of Certiorari Should Not Be Granted

I. The Supreme Judicial Court's Decision Had an Independent and Adequate Basis in State Law, Thus Precluding the Exercise of Certiorari Review

By focusing solely on the First Amendment considerations relied upon by the SJC in reversing the judgment of contempt against Radin, Sinnott totally ignores the wholly independent state law grounds which provided a separate basis for the SJC's decision. Viewed in the light of those independent state law grounds, there is no basis for concluding that "the court decided the case the way it did because it believed that federal law required it to do so." See *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983).

Radin's opposition to Sinnott's subpoena has been based, from the outset, on four independent grounds, three of which rest entirely on state law. Apart from the First Amendment, Radin has opposed forced disclosure on the basis of: (1) Article 16 of the Declaration of Rights of the Massachusetts Constitution;[2] (2) Mass. R. Civ. P. 26(c) and 45; and (3) the common

[2] The SJC has stated that "no inference should be drawn that the Declaration of Rights of the Constitution of this Commonwealth is less capable of protecting the essentials of freedom of speech, of the press, and of assembly than is the Federal Constitution." *Commonwealth* v. *Gilfedder*, 321 Mass. 335, 343, 73 N.E.2d 241, 245 (1947).

law of Massachusetts. App. 5. In that context, the *Sinnott* court's statement of the question presented in the case quite clearly provides the requisite "plain statement," *Long*, 463 U.S. at 1041, that its decision finds independent and adequate footing on state law grounds.

> The narrow question on review in this case is whether the Superior Court judge's denials of the motions to compel and the motions to vacate those orders constituted an abuse of the "broad measure of discretion" accorded him. *Matter of Roche*, 381 Mass. 624, 638 (1980), citing *Matter of Pappas*, 358 Mass. 604, 614, n.13 (1971). . . . Unless that ruling constituted an abuse of discretion, there is no basis for the judgment of contempt. (Citation omitted). We discern no such abuse of discretion and, therefore, reverse the adjudication of civil contempt.

App. 13-14.

The *Sinnott* court stated that in properly exercising its discretion to deny Sinnott's motion to compel, the trial court had applied the principles and considerations enunciated in *Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources*, 395 Mass. 164, 479 N.E.2d 154 (1985). App. 7. In that earlier decision, the SJC reiterated its previous declarations that "there is no constitutionally based reporter's privilege under the First Amendment or art. 16." *Id.* at 171, 479 N.E.2d at 158. While acknowledging that a trial court considering a motion to compel disclosure of confidential news sources should "consider the effect of compelled disclosure on values underlying the First Amendment *and* art. 16" of the Declaration of Rights of the Massachusetts Constitution, *id.* at 171, 479 N.E.2d at 158 (emphasis added), the

Petition court ruled that any protections it might in the future recognize would be based on the development of the common law of Massachusetts. *Id.* at 170-72, 479 N.E.2d at 157-59.

The *Sinnott* court also expressly relied on its previous opinion in *Matter of Roche*, 381 Mass. 624, 411 N.E.2d 466 (1980). App. 13-18. In one section of *Roche* referred to by the *Sinnott* court, the SJC cited *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), for the proposition that "the United States Supreme Court has established that the First Amendment does not 'grant newsmen a testimonial privilege that other citizens do not enjoy.'" *Roche*, 381 Mass. at 631, 411 N.E.2d at 472. "We are not free," the *Roche* court continued, "to construe the First Amendment as creating a constitutional protection broader than that established by the Supreme Court." *Id.* at n.8. Foreshadowing its decision in *Sinnott*, the *Roche* court nevertheless noted its "willingness to consider, in future cases, whether the central role a free discussion of public issues plays in a self-governing society requires, *as a matter of Massachusetts practice*, that persons addressing such issues be afforded more clearly defined protection against intrusive discovery . . . ." *Id.* at 638-39, 411 N.E.2d at 476 (emphasis added).

Consistent with its prior rulings (on which it expressly relied) that it might in the future recognize protections for a newsperson's sources as a matter of Massachusetts law, the *Sinnott* court described the balancing process which was engaged in by the *Sinnott* trial court as "a necessary component of the analysis *required by Mass. R. Civ. P. 26(c)* to 'assess the competing interests of preventing annoyance, embarrassment, oppression, or undue burden or expense,' . . . and considerations of an efficient and just resolution of the action." App. 7-8 (emphasis added).

In sum, the *Sinnott* opinion makes clear that state law provided a wholly independent and adequate basis for the finding that the trial court had not abused its discretion in denying

discovery of Radin's sources. The exercise of certiorari review, therefore, cannot be justified.

II. Sinnott's Claim That the Supreme Judicial Court's Decision Abridged His Rights Under the Fourteenth Amendment Was Not Adequately Presented in the State System to Justify the Exercise of Certiorari Review

Sinnott's petition describes the third question presented for review as "whether refusing to compel a non-party reporter to answer questions relating to persons previously deposed which may impeach or contradict the testimony of such persons abridges a litigant's interest in obtaining evidence necessary to prove his claim and the public interest in the fair administration of justice guaranteed under the Fourteenth Amendment."

No Massachusetts court has yet had the opportunity to resolve that issue. Neither Radin's statement of the issues in the appeal of the judgment of contempt entered against him, nor Sinnott's statement of the issues in his brief on appeal, addressed the question of whether Sinnott has a right under the Fourteenth Amendment to pursue his civil privacy claims, or whether a trial court's order limiting permissible discovery concerning those claims violates the Fourteenth Amendment. (See Respondent's Appendix at 1a-3a, attached hereto.) Under these circumstances, "absent the adversarial dispute necessary to apprise the state court of the argument" now being raised, this Court should decline certiorari review. *Illinois* v. *Gates*, 462 U.S. 213, 220-23 (1983); *Bankers Life and Casualty Co.* v. *Crenshaw*, U.S. , 108 S. Ct. 1645, 1650 (1988).[1]

[1] In any event, Sinnott's claim that he was denied discovery rights guaranteed by the Fourteenth Amendment to the Constitution is an insubstantial claim. The right to pretrial discovery is not guaranteed by the Fourteenth Amendment.

III. The Balancing Process Engaged in by the Trial Court, and Affirmed by the SJC, Does Not Conflict With Applicable Decisions of This Court

The Supreme Judicial Court's decision that the trial court did not abuse its discretion in denying Sinnott's discovery request is consistent with, and indeed compelled by, this Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972).

Branzburg held that newspaper reporters subpoenaed to appear before grand juries to testify concerning arguably criminal activities to which they had been eye-witnesses were required to appear and answer relevant questions put to them by the grand jury. In so doing, however, the Court was careful to take account of the First Amendment interests the reporters asserted. Writing for the majority, Mr. Justice White observed that the Court did not "question the significance of free speech,

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The kind of discretion accorded to a court to regulate discovery under Mass. R. Civ. P. 26(c) and 45 exists, in one form or another, in virtually all of the courts in this nation. See generally Fed. R. Civ. P. 26(c). If, as this Court has held, the right to a jury trial guaranteed by the Seventh Amendment to the Constitution does not apply to trials in state courts, *Alexander* v. *Virginia*, 413 U.S. 836 (1973), surely the Fourteenth Amendment does not guarantee pretrial discovery in a civil action. See *Coughlin* v. *Westinghouse Broadcasting and Cable*, 603 F. Supp. 377, 382-383 (E.D. Pa.), *aff'd*, 780 F.2d 340 (3d Cir. 1985), *cert. denied*, 476 U.S. 1187, 106 S. Ct. 2927 (1986) (application of Pennsylvania shield law does not deprive plaintiff of due process rights guaranteed by Fourteenth Amendment); *Maressa* v. *New Jersey Monthly*, 89 N.J. 176, 445 A.2d 376, 385, *cert. denied*, 459 U.S. 907 (1982) (because plaintiff's interest in compelling discovery is not of constitutional dimension, New Jersey shield law did not violate any due process rights of libel plaintiff). Cf. *Samuelson* v. *Susen*, 576 F.2d 546, 552 (3d Cir. 1978) (medical review committee privilege did not violate libel plaintiff's due process rights); *Graham* v. *Teledyne-Continental Motors*, 805 F.2d 1386, 1390 (9th Cir. 1986), *cert. denied*, U.S. , 108 S. Ct. 67 (1987) ("Courts have consistently rejected arguments that deprivation of evidence constitutes a denial of due process.").

press, or assembly to the country's welfare." *Id.* at 681. "Nor," he continued,

> is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.

Id. Along the same lines, Mr. Justice White noted that the cases then before the Court involved no attempt "to require the press to publish its sources of information or indiscriminately to disclose them on request." *Id.* at 682.

On balance, however, the Court concluded that the interest of the State in prosecuting violations of its criminal laws satisfied the First Amendment requirement that "a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights." *Id.* at 700.

Mr. Justice Powell, who concurred specially in *Branzburg* and whose concurrence was necessary to create the majority of five which decided the case, was even more emphatic in his articulation of the view that a reporter's relationship with sources was entitled to the protections of the First Amendment. In Justice Powell's opinion, the protections of the First Amendment require that in each case the legitimate needs of law enforcement should be balanced against the First Amendment claims asserted by the reporter. His opinion was expressly written, in his own words, "to emphasize what [seemed to him] to be the limited nature of the Court's holding." *Id.* at 709. Continuing, he stated that "[t]he Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Id.*

> Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.

Id. at 710.

From *Branzburg* has come the widespread recognition that the First Amendment forbids the unnecessary forced disclosure of confidential news sources. Post-*Branzburg* decisions have held that a party seeking disclosure must, in essence, make three conceptually related showings: (1) that the information sought is available from no alternative source; (2) that the interest in disclosure is strong and compelling enough to override the undoubted disruption in the free flow of information which such disclosure necessarily would entail; and (3) that the information sought goes to the heart of the claim or defense of the party seeking disclosure.[4]

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[4] See generally 28 C.F.R. § 50.10 (Dept. of Justice Policy with Regard to the Issuance of Subpoenas to Members of the News Media). See also *Bruno & Stillman Co.* v. *Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Von Bulow* v. *Von Bulow*, 811 F.2d 136 (2d Cir.), *cert. denied sub nom.*, *Reynolds* v. *Von Bulow*, U.S. , 107 S. Ct. 1891 (1987); *Miller* v. *Transamerica Press, Inc.*, 621 F.2d 721 (5th Cir.), *supp. op., reh., den.*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir.), *cert. dismissed*, 417 U.S. 938 (1974); *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Cerrito*

The *Sinnott* court did no more than apply the principles established in *Branzburg* to the particular facts of this tenuous (at best) civil invasion of privacy action. By "balancing between the public interest in every person's evidence and the public interest in the free flow of information," the *Sinnott* court simply adhered to Justice Powell's admonition in *Branzburg* that the "asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." 408 U.S. at 710. Such a balancing process obviously required the court to

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v. *Time, Inc.*, 302 F. Supp. 1071 (N.D. Calif. 1969), *aff'd in part, rev'd in part*, 449 F.2d 306 (9th Cir. 1971); *Garland* v. *Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *KSDO* v. *Riverside Superior Court*, 136 Cal. App. 3d 375, 186 Cal. Rptr. 211 (Cal. Ct. App. 1982); *Gagnon* v. *Fremont District Court*, 632 P.2d 567 (Colo. 1981); *Sierra Life Ins. Co.* v. *Magic Valley Newspapers, Inc.*, 101 Idaho 795, 623 P.2d 103 (1980); *Downing* v. *Monitor Publishing Co.*, 120 N.H. 383, 415 A.2d 683 (1980); *Taylor* v. *Miskovsky*, 640 P.2d 959 (Okla. 1981); *United States* v. *Steelhammer*, 561 F.2d 539 (1977); *Gulliver's Periodicals* v. *Chas. Levy Circulating Co.*, 455 F. Supp. 1197 (N.D. Ill. 1978).

The test has also been applied in civil cases to which reporters were not parties: E.g., *McGraw-Hill, Inc.* v. *Arizona*, 680 F.2d 5 (2d Cir.), *cert. denied*, 459 U.S. 909 (1982); *Zerilli* v. *Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Riley* v. *City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Baker* v. *F&F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Matheson* v. *Bangor Publishing Co.*, 414 A.2d 1203 (Me. 1980).

It also has been applied in criminal cases, both at the state and federal level. *United States* v. *Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *United States* v. *Orsini*, 424 F. Supp. 229 (E.D.N.Y. 1976), *aff'd sum.*, 559 F.2d 1206 (2d Cir.), *cert. denied*, 434 U.S. 997 (1977); *Bursey* v. *United States*, 466 F.2d 1059 (9th Cir. 1972); *Tribune Co.* v. *Huffstetler*, 489 So.2d 772 (1986); *Laughlin* v. *Florida*, 323 So.2d 691 (Fla. App. 1975), *cert. denied*, 339 So.2d 1170 (Fla. 1976); *Kansas* v. *Sandstrom*, 581 P.2d 812 (Kan. 1978), *cert. denied*, 440 U.S. 929 (1979); *Brown* v. *Commonwealth*, 204 S.E.2d 429 (Va.), *cert. denied*, 417 U.S. 966 (1974); *Vermont* v. *St. Peter*, 315 A.2d 254 (Vt. 1974); *Zelenka* v. *State*, 266 N.W.2d 279 (Wis. 1978).

consider the "investigative purpose" of and the "public interest" in Radin's use of confidential sources, "especially in light of the questionable viability of Sinnott's invasion of privacy claims and the lack of a clear demonstration of reasons for a need to know the precise identity of Radin's sources." App. 17-18. Similarly, as the SJC found, the availability of alternative sources also was properly considered by the trial court in avoiding the needless disclosure of confidential relationships. App. 19. Given *Branzburg's* requirement that "a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights," 408 U.S. at 700, the SJC could only conclude that Sinnott's questionable (at best) need for forced disclosure did not justify the infringement of First Amendment rights that an order compelling disclosure would entail.

Sinnott argues that certiorari nevertheless should be granted because his accident statement was not available to the general public under Massachusetts law. "[I]t is an error of law," he argues, "to consider the impact of compelled disclosure on the free flow of information to which the press has no right of access." Petition at 33.

A threshold, and fundamental, flaw with Sinnott's argument is that there simply is no law which restricts public access to Sinnott's accident statement, even if one assumes that the information could not have been obtained under the Massachusetts Freedom of Information Act ("FOIA") (a proposition which Radin disputes). Like its federal counterpart, the Massachusetts FOIA does not prohibit a custodian from releasing exempt information. Rather, it merely provides that a custodian is not compelled to disclose exempt information, as he must do with non-exempt materials. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 294 (1979); *Westinghouse Broadcasting Co.* v. *Sergeant-At-Arms of the General Court*, 375 Mass. 179, 185 n.9, 375 N.E.2d 1205, 1209 n.9 (1978). Similarly, because

M.G.L. c. 66A does not apply to local units of government like the Boston Retirement Board, that statute also does not prohibit the release of Sinnott's accident statement. See *Spring* v. *Geriatric Authority of Holyoke*, 394 Mass. 274, 475 N.E.2d 727 (1984). It is no wonder, then, that the SJC spoke of the "questionable viability" of Sinnott's claims.

The very linchpin of Sinnott's certiorari argument, therefore, is his mistaken belief that Massachusetts law forbids public access to his accident statement. Both the *Sinnott* opinion and prior Massachusetts precedent indicate to the contrary. At a minimum, a definitive ruling on that issue of pure state law would have to be obtained before this Court could consider Sinnott's certiorari argument.

Even assuming that the SJC might one day hold that Massachusetts law does forbid public access to public officials' accident statements, Sinnott's argument that the First Amendment automatically becomes irrelevant misunderstands the difference between a constitutional right of access and a constitutional right to disseminate information. Reduced to its essentials, Sinnott's argument limits First Amendment protections for public debate to those topics which the government has deigned the public worthy or capable to discuss. This Court has long made clear, however, that the issue of whether the public and the press have a right of access to governmental information is wholly distinct from the issue of whether the dissemination of restricted information, once obtained by the press, is entitled to First Amendment protection. Indeed, it is the protections afforded in the latter circumstances that have been recognized as laying at the heart of the First Amendment. See *New York Times* v. *United States*, 403 U.S. 713 (1971); *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979) ("A free press cannot be made to rely solely upon the suffrance of government to supply it with information.").

Nor, as Sinnott seems to imply, does the fact that the source must remain anonymous diminish the First Amendment interests at stake. As this Court has acknowledged, communications from confidential sources have played a critical role in this country's tradition of free spirited public debate.

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption

> of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

Talley v. *California*, 362 U.S. 60, 64-65 (1960). See also *NAACP* v. *Alabama*, 357 U.S. 449, 462-63 (1958); *McCray* v. *Illinois*, 386 U.S. 300, 312 (1967); 8 Wigmore On Evidence, § 2374 (Rev. ed. 1961).

In sum, Sinnott's petition for certiorari is based on the misconception that if state law prohibits access to his accident statement (a pure issue of state law on which Sinnott and the SJC apparently disagree), the First Amendment would offer no protection for the dissemination of such information, regardless of its relevance to the public's examination of the performance of his public duties and to its evaluation of the public pension system. Such a claim does not merit certiorari review.

IV. Because the First Amendment Bars Sinnott's Privacy Claims, the Certiorari Petition Presents No Important Unsettled Question of Federal Law

Recent historical events such as the Viet Nam War, Watergate, and the Iran-Contra Affair each have demonstrated the need for First Amendment protections for the dissemination of information which the government has designated as confidential but which nevertheless is of intense, legitimate public interest. Despite those lessons, Sinnott's entire action is based on the flawed notion that, assuming Massachusetts law restricts access to certain information, the truthful disclosure of that information, regardless of its underlying nature, constitutes an unlawful invasion of privacy. Because the First Amendment prohibits sanctions from being placed on the dissemination of truthful information relevant to the conduct of a public official,

even assuming that Massachusetts law prohibited access to Sinnott's accident statement, his privacy claims nevertheless would be constitutionally barred.

The public's legitimate interest in the undisputably truthful account of Sinnott's accident statement is particularly intense given: (1) the context in which the application arose (i.e., in the midst of an examination of alleged abuses and inefficiencies of the pension system); (2) the fact that it was filed only: (a) after Sinnott had been fired, (b) because he had been fired, and (c) at the suggestion of Louise Day Hicks who had told him that "we did it for Bobby Toomey, we can do it for you", SJC R.A. 146; (3) the fact that the statement contained facts which are not true and which, as Sinnott conceded, make him look like a "faker"; (4) the fact that the alleged injury occurred over two years before the application was filed, and (5) the novel nature of the asserted grounds for Sinnott's application (attendance at two rock concerts and a licensing hearing) — an application which, if granted, might have cost the taxpayers thousands of dollars, and which application, after public disclosure, was in fact withdrawn. Finally, the far-reaching reforms of the pension system which came about in part as a result of the attention given to the system by the *Globe* series and by others stand as a further testament to the public nature of the facts which form the basis for Sinnott's invasion of privacy claim.

The constitutional flaws in Sinnott's case were highlighted in this Court's recent decision in *Hustler* v. *Falwell*, U.S. , 108 S. Ct. 876 (1988). Rejecting a public figure's claim for emotional distress, the Court stated:

> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. . . . 'The fact that society may find speech

> offensive is not a sufficient reason for suppressing it.' [Citation omitted]. . . . [P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications . . . without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

Id. at 879-82.

Just as public officials may not recover for the tort of emotional distress without showing a false statement of fact, so too the logic and language of *Falwell* compels the conclusion that a public official may not recover for invasion of privacy (which is, after all, a claim seeking damages for emotional distress) if no false information was disseminated, at least where the published information concerns the official's conduct in office. As was recognized long ago, "[a] popular Government, without popular information, or the means of acquiring it, is but a prologue to a Farce or a Tragedy or perhaps both." 9 Writings of James Madison 103 (6. Hunt. 2d. 1910). Truthful dissemination of matters of public interest concerning performance in office by a public official thus cannot form the basis for an invasion of privacy claim under the First Amendment, regardless of state statutory law to the contrary. See, e.g., *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 839 (1978); *Smith* v. *Daily Mail Publishing*, 443 U.S. 97 (1979); *Cox Broadcasting* v. *Cohn*, 420 U.S. 469 (1975); Restatement (Second) of Torts, § 652D (1978). Because Sinnott cannot prevail on his claims, forced disclosure of Radin's sources should not be allowed.

In addition, any construction of M.G.L. c. 214, § 1B and § 3B which permitted the imposition of sanctions for the disclosure of information simply because the material was not

publicly accessible without regard to whether the underlying information constitutes a matter of legitimate public concern would render the statutes unconstitutionally overbroad. Such a construction would lead to absurd results, as, for example, by imposing sanctions for the dissemination of information as innocuous as the contents of a typical library card or a gun permit, which, under M.G.L. c. 4, § 7, twenty-sixth (j) and (k) are exempt from disclosure under the Massachusetts FOIA. The substantial overbreadth of such a construction require the dismissal of Sinnott's claims. See generally *NAACP* v. *Button*, 371 U.S. 415, 432-33 (1963); *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Commonwealth* v. *Oakes*, 401 Mass. 602, 518 N.E.2d 836, *cert. granted,* U.S. , 108 S. Ct. 1994 (1988); L. Tribe, Constitutional Law, §§ 12-24 through 12-30 (1978).

Similarly, if M.G.L. c. 214, § 1B and § 3B were construed to permit the sanctioning of truthful speech concerning the conduct of public officials, the statutes would be unconstitutionally vague, also requiring the dismissal of Sinnott's claims and obviating the need for forced disclosure of Radin's sources. See generally *Coates* v. *City of Cincinatti*, 402 U.S. 611, 614 (1971) (ordinance prohibiting "annoying" public conduct held unconstitutionally vague); *Smith* v. *Goguen*, 415 U.S. 566, 578 (1974) (statutory prohibition on contemptuous treatment of the flag held unconstitutionally vague). Cf. *Falwell*, 108 S. Ct. at 877 (rejecting "outrageousness" standard of liability as overly subjective).

Conclusion

For each of the foregoing independent reasons, respondent Charles A. Radin respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

E. SUSAN GARSH*
JONATHAN M. ALBANO
BINGHAM, DANA & GOULD
150 Federal Street
Boston, Massachusetts 02110
(617) 951-8000
Attorneys for Respondent
Charles A. Radin

**Counsel of Record*

November 9, 1988

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Appendix

STATEMENT OF THE ISSUES IN BRIEF OF APPELLANT CHARLES A. RADIN, IN SINNOTT v. BOSTON RETIREMENT BOARD, ET AL., MASSACHUSETTS SUPREME JUDICIAL COURT NO. S-4754

1. Whether the First Amendment to the United States Constitution, Article 16 of the Declaration of Rights of the Massachusetts Constitution, or the common law afford a privilege against the disclosure of confidential news sources in civil actions for invasion of privacy brought by public officials in cases where the newsperson is not a party to the underlying proceedings.

2. Whether a judgment of civil contempt against a non-party newspaper reporter for refusing to reveal confidential sources used in the preparation of a truthful newspaper article concerning possible abuses of the Commonwealth's public pension system should be reversed because the plaintiff cannot recover in his underlying action under: (a) Massachusetts law; (b) the First Amendment to the United States Constitution; and (c) Article 16 of the Declaration of Rights of the Massachusetts Constitution.

3. Whether a judgment of civil contempt against a non-party newspaper reporter for refusing to reveal confidential sources used in the preparation of a truthful newspaper article concerning possible abuses of the Commonwealth's public pension system should be reversed because the public interest in protecting the free flow of information outweighs the plaintiff's interest in obtaining the reporter's testimony in the unique circumstances of this case.

4. Whether a judgment of civil contempt against a non-party newspaper reporter for refusing to reveal confidential sources

used in the preparation of an article concerning possible abuses of the Commonwealth's public pension system should be reversed because the plaintiff has failed to exhaust several alternative sources of the information sought from the reporter.

STATEMENT OF THE ISSUES IN BRIEF OF APPELLEE RICHARD J. SINNOTT, IN SINNOTT v. BOSTON RETIREMENT BOARD, ET AL., MASSACHUSETTS SUPREME JUDICIAL COURT NO. S-4754

A. Whether Radin's refusal to answer the twenty-eight questions set forth in Exhibit 1 annexed to the Superior Court order dated February 10, 1988 was clear and undoubted disobedience of a clear and unequivocal command of the court.

B. Whether the order of the Single Justice dated January 27, 1988 which directed entry of the order dated February 10, 1988 was valid.